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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA DEPARTMENT OF TOXIC
SUBSTANCES CONTROL,

Plaintiff,

v.

NO. CIV. S-02-2389 LKK/DAD

PAYLESS CLEANERS; COLLEGE
CLEANERS; HEIDINGER CLEANERS;
NORGE VILLAGE CLEANERS; CAVA,
INC., a California corporation;
LOBDELL CLEANERS; CITY OF CHICO;
NORVILLE R. WEISS; JANET L. WEISS;
PAUL A. TULLIUS; VICTORIA TULLIUS;
ROBERT H. HEIDINGER; INEZ N.
HEIDINGER; 5TH AND IVY, a general
partnership; RICHARD C. PETERS and
RAMONA W. PETERS, individually and
as Trustees of the Peters Family
Trust; BETTY M. ROLLAG; RANDALL
ROLLAG; and TAMI ROLLAG,

O R D E R

Defendants.

AND RELATED COUNTER-CLAIMS.

Third party plaintiffs Richard W. Peters and Ramona A. Peters
(the "Peters") individually and collectively as Trustees of the

1 Peters Family Trust have brought claims for contribution and
2 indemnity pursuant to CERCLA, 42 U.S.C. §§ 9601 et seq., as well
3 various state law claims against third-party defendant Maytag
4 Corporation ("Maytag") and Fedders Corporation ("Fedders")
5 (collectively, "defendants"). Pending before the court is Maytag
6 and Fedders' motion for summary judgment on several of the Peters'
7 state law claims. Defendants assert that the state law claims are
8 barred by the statute of limitations. The court resolves the
9 matter upon the parties' papers and supplemental briefing, and
10 after oral argument. For the reasons set forth below, the court
11 grants the motion with respect to the Peters' negligence,
12 negligence per se, and strict liability claims and denies the
13 motion with respect to the Peters' nuisance per se claim.

14 **I. Background**

15 **A. General Background**

16 The Peters are the original defendants in an action arising
17 out of a two-mile wide perchloroethylene ("PCE") "plume" located
18 in the city of Chico, California. Defs.' Statement of Undisputed
19 Facts ("SUF") ¶¶ 1-4. On October 31, 2002, the California
20 Department of Toxic Substances Control ("DTSC") filed a cost
21 recovery action against various individuals and companies,
22 including the Peters, alleging claims under the Comprehensive
23 Environmental Response, Compensation, and Liability Act (CERCLA),
24 42 U.S.C. §§ 9601 et seq., and under state law. Defs.' SUF ¶¶ 1-2.
25 The Peters are the owners of property in the City of Chico from
26 which hazardous substances, including PCE, were allegedly released

1 when a dry cleaning business operated on the property. Defs.' SUF
2 ¶ 4.

3 Upon being sued, the Peters filed a third party complaint
4 against various entities, including Maytag and Fedders. The
5 complaint alleges several claims for relief, including indemnity
6 and contribution pursuant to CERCLA. Pending before this court is
7 Maytag and Fedders' motion for summary judgment on four of the
8 Peters' state law claims: (1) strict products liability, (2)
9 negligence, (3) negligence per se, and (4) nuisance per se. Maytag
10 and Fedders contend that each claim is barred by the statute of
11 limitations.

12 **B. Facts**

13 On October 11, 1989 the Department of Health Services¹ (the
14 "Department") sent a letter to the Peters, which stated, in part:

15 [Y]our facility was found to contain
16 Perchloroethylene (PCE) in high concentrations in
17 the soils. Information collected by DHS indicates
18 that PCE was used as a solvent in the dry cleaning
19 operations . . . As a result of our investigation,
DHS has concluded that PCE has been improperly
disposed of as a hazardous waste, and it may have
migrated off site into wells formerly used for
Chico's drinking water supply.

20 Defs.' SUF ¶ 15, Decl. of Richard Crites ("Crites Decl."), Ex. N.
21 The Peters responded to the Department via a letter dated October
22 19, 1989, which stated, in part: "I look forward to meeting with
23 you in the near future concerning the presence of . . . PCE in the
24

25 ¹ The Department of Health Services later became the
26 Department of Toxic Substance Control, plaintiff in the underlying
action against the Peters.

1 soil." Crites Decl., Ex. O.

2 From January to October of 1990, the Peters and the Department
3 exchanged a series of letters regarding disposal and cleanup of the
4 PCE. Defs.' SUF ¶¶ 19-25. These communications culminated in a
5 determination by the Department that the Peters were in non-
6 compliance with a Remedial Action Order imposed by the Department.
7 Defs.' SUF ¶ 25.² In an about-face, however, the Department
8 determined in 1996 that the Peters' property "posed no significant
9 threat to public health, welfare or the environment." Pls.' SDF
10 ¶ 6.

11 **C. Procedural History**

12 On October 31, 2002, DTSC initiated the underlying action, in
13 which the Peters are defendants. Defs.' SUF ¶¶ 1-3. On December
14 2, 2003, the Peters filed a first amended third party complaint.
15 Defs.' SUF ¶ 5. Among the named third party defendants was Maytag
16 Corporation. Defs.' SUF ¶ 6. Maytag filed a motion to dismiss,
17 which this court granted on May 3, 2004. Defs.' SUF ¶ 7. The
18 Peters filed a second amended third party complaint on Maytag on
19 June 1, 2004, Defs.' SUF ¶ 8. Maytag filed a subsequent motion to

20
21 ² The Peters do not dispute that these 1989-1990
22 communications took place. Pls.' Response to Defs.' SUF ¶¶ 15-27.
23 Rather, they allege that the communications referred to "a separate
24 and distinct area of contamination unrelated to the contamination
25 at issue in the instant case." Pls.' Response to Defs.' SUF ¶¶ 15-
26 27; Pls.' Statement of Disputed Facts ("SDF") ¶ 4. Specifically,
the Peters maintain that the present litigation concerns
contamination of the "Southwest plume" in Chico, California,
whereas DTSC once believed the Peters' property contributed to the
"Central plume" in Chico. Pls.' SDF ¶¶ 1-3. Apparently, there
was separate litigation regarding the Central plume, in which the
Peters were not named as defendants. Pls.' SDF ¶ 5.

1 dismiss, which this court granted in part and denied in part on
2 March 7, 2005. Defs.' SUF ¶ 9.

3 In that latter order, the court, sua sponte, addressed the
4 issue of whether plaintiffs had pled the existence of cognizable
5 injury. Based on case law in existence at that time, the court
6 held that there was a distinction between the mere presence of PCE,
7 which would not give rise to suit, and the contamination of
8 property by PCE, which would. This "mere presence" versus
9 "contamination" distinction was based upon precedent from asbestos
10 cases holding that only contamination of property (e.g., the
11 release of asbestos fibers into the environment), not the mere
12 presence of asbestos (e.g., asbestos in walls), constitutes the
13 physical damage necessary for accrual of negligence and strict
14 liability claims in California. San Francisco Unified Sch. Dist.
15 v. W.R. Grace & Co., 37 Cal. App. 4th 1318, 1335 (1995). As
16 explained below, however, that distinction in California case law
17 has subsequently been eroded.

18 II. Standard

19 Summary judgment is appropriate when it is demonstrated that
20 there exists no genuine issue as to any material fact, and that the
21 moving party is entitled to judgment as a matter of law. Fed. R.
22 Civ. P. 56(c); see also Adickes v. S.H. Kress & Co., 398 U.S. 144,
23 157 (1970); Secor Ltd. v. Cetus Corp., 51 F.3d 848, 853 (9th Cir.
24 1995).

25 Under summary judgment practice, the moving party
26

1 always bears the initial responsibility of
2 informing the district court of the basis for
3 its motion, and identifying those portions of
4 "the pleadings, depositions, answers to
5 interrogatories, and admissions on file,
6 together with the affidavits, if any," which
7 it believes demonstrate the absence of a
8 genuine issue of material fact.

9 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the
10 nonmoving party will bear the burden of proof at trial on a
11 dispositive issue, a summary judgment motion may properly be made
12 in reliance solely on the 'pleadings, depositions, answers to
13 interrogatories, and admissions on file.'" Id. Indeed, summary
14 judgment should be entered, after adequate time for discovery and
15 upon motion, against a party who fails to make a showing sufficient
16 to establish the existence of an element essential to that party's
17 case, and on which that party will bear the burden of proof at
18 trial. See id. at 322. "[A] complete failure of proof concerning
19 an essential element of the nonmoving party's case necessarily
20 renders all other facts immaterial." Id. In such a circumstance,
21 summary judgment should be granted, "so long as whatever is before
22 the district court demonstrates that the standard for entry of
23 summary judgment, as set forth in Rule 56(c), is satisfied." Id.
24 at 323.

25 If the moving party meets its initial responsibility, the
26 burden then shifts to the opposing party to establish that a
genuine issue as to any material fact actually does exist.
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
586 (1986); see also First Nat'l Bank of Ariz. v. Cities Serv. Co.,

1 391 U.S. 253, 288-89 (1968); Secor Ltd., 51 F.3d at 853.

2 In attempting to establish the existence of this factual
3 dispute, the opposing party may not rely upon the denials of its
4 pleadings, but is required to tender evidence of specific facts in
5 the form of affidavits, and/or admissible discovery material, in
6 support of its contention that the dispute exists. Fed. R. Civ.
7 P. 56(e); Matsushita, 475 U.S. at 586 n.11; see also First Nat'l
8 Bank, 391 U.S. at 289; Rand v. Rowland, 154 F.3d 952, 954 (9th Cir.
9 1998). The opposing party must demonstrate that the fact in
10 contention is material, i.e., a fact that might affect the outcome
11 of the suit under the governing law, Anderson v. Liberty Lobby,
12 Inc., 477 U.S. 242, 248 (1986); Owens v. Local No. 169, Ass'n of
13 Western Pulp and Paper Workers, 971 F.2d 347, 355 (9th Cir. 1992)
14 (quoting T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,
15 809 F.2d 626, 630 (9th Cir. 1987)), and that the dispute is
16 genuine, i.e., the evidence is such that a reasonable jury could
17 return a verdict for the nonmoving party, Anderson, 477 U.S. 248-
18 49; see also Cline v. Indus. Maint. Eng'g & Contracting Co., 200
19 F.3d 1223, 1228 (9th Cir. 1999).

20 In the endeavor to establish the existence of a factual
21 dispute, the opposing party need not establish a material issue of
22 fact conclusively in its favor. It is sufficient that "the claimed
23 factual dispute be shown to require a jury or judge to resolve the
24 parties' differing versions of the truth at trial." First Nat'l
25 Bank, 391 U.S. at 290; see also T.W. Elec. Serv., 809 F.2d at 631.
26 Thus, the "purpose of summary judgment is to 'pierce the pleadings

1 and to assess the proof in order to see whether there is a genuine
2 need for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R.
3 Civ. P. 56(e) advisory committee's note on 1963 amendments); see
4 also Int'l Union of Bricklayers & Allied Craftsman Local Union No.
5 20 v. Martin Jaska, Inc., 752 F.2d 1401, 1405 (9th Cir. 1985).

6 In resolving the summary judgment motion, the court examines
7 the pleadings, depositions, answers to interrogatories, and
8 admissions on file, together with the affidavits, if any. Rule
9 56(c); see also In re Citric Acid Litig., 191 F.3d 1090, 1093 (9th
10 Cir. 1999). The evidence of the opposing party is to be believed,
11 see Anderson, 477 U.S. at 255, and all reasonable inferences that
12 may be drawn from the facts placed before the court must be drawn
13 in favor of the opposing party, see Matsushita, 475 U.S. at 587
14 (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)
15 (per curiam)); see also Headwaters Forest Def. v. County of
16 Humboldt, 211 F.3d 1121, 1132 (9th Cir. 2000). Nevertheless,
17 inferences are not drawn out of the air, and it is the opposing
18 party's obligation to produce a factual predicate from which the
19 inference may be drawn. See Richards v. Nielsen Freight Lines, 602
20 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902
21 (9th Cir. 1987).

22 Finally, to demonstrate a genuine issue, the opposing party
23 "must do more than simply show that there is some metaphysical
24 doubt as to the material facts. . . . Where the record taken as a
25 whole could not lead a rational trier of fact to find for the
26 nonmoving party, there is no 'genuine issue for trial.'"

1 Matsushita, 475 U.S. at 587 (citation omitted).

2 **III. Analysis**

3 **A. Strict Products Liability, Negligence, and Negligence Per Se**

4 Maytag and Fedders argue that the bulk of the Peters' state
5 law claims are barred by the statute of limitations. In
6 California, the statute of limitations for claims based on
7 injury to real property is three years. Cal. Code of Civ. P. §
8 338(b).³ The initial question before the court is when the
9 causes of action accrued, and the limitations period commenced,
10 on the claims at issue.

11 The statute of limitations for tort actions "begins to run
12 upon the occurrence of the last event essential to the cause of
13 action." Wilshire Westwood Assoc. v. Atlantic Richfield Co., 20
14 Cal. App. 4th 732, 739 (1993). Damages are an essential element
15 to claims in tort; accordingly, the statute of limitations does
16 not begin to run until this element is satisfied. San Francisco
17 Unified Sch. Dist., 37 Cal. App. 4th at 1326 (1995) ("the
18 statute of limitations does not begin to run and no cause of
19 action accrues in a tort action until damage has occurred").

20 For claims of strict liability or negligence, "the
21 compensable injury must be physical harm to persons or property,

22
23 ³ The parties do not dispute that Cal. Code Civ. P. § 338(b)
24 provides the appropriate limitations period. The parties do
25 dispute, however, whether the California discovery rule or the
26 federal discovery rule in CERCLA, 42 U.S.C. § 9658(b)(4)(A), should
apply in tolling the limitations period. Nevertheless, the court
need not resolve this issue because whether a cognizable injury has
occurred at all is dispositive of the claims addressed in this
section.

1 not mere economic loss." San Francisco Unified Sch. Dist., 37
2 Cal. App. 4th at 1327 (citing Seely v. White Motor Co., 63 Cal.
3 2d 9 (1965) (strict liability), Sacramento Regional Transit
4 Dist. v. Grumman Flexible 158 Cal. App. 3d 289, 294, 298 (1984)
5 (negligence)).

6 In SFUSD, the First Appellate District held that asbestos
7 caused physical harm to property when it reached the level at
8 which it becomes a risk to human health. 37 Cal. App. 4th at
9 1318. Accordingly, the court stated:

10 [W]e hold that in an asbestos-in-building case, the
11 mere presence of asbestos constitutes only a threat
12 of future harm. Contamination by friable asbestos is
13 the physical injury, and the actual, appreciable harm
14 that must exist before a property owner's strict
15 liability or tort cause of action . . . accrues.

16 San Francisco Unified Sch. Dist., 37 Cal. App. 4th at 1335.

17 Reasoning by analogy, this court held in its March 2005 order
18 that the Peters had sufficiently alleged the "contamination" of
19 their property by PCE, rather than the mere presence of PCE.

20 In Aas v. Superior Court, however, the California Supreme
21 Court contradicted the reasoning of SFUSD, rejecting the notion
22 that the relevant inquiry is whether or not there is significant
23 risk to human health. 24 Cal. 4th 627 (2000). In Aas,
24 negligence and strict liability claims were brought by
25 homeowners against the developers and contractors responsible
26 for building their homes. 24 Cal. 4th at 633. The plaintiffs
alleged that "their dwellings suffer[ed] from a variety of
construction defects" that threatened the health and safety of
residents, but acknowledged "that many of the defects . . .

1 ha[d] not actually caused property damage." Id. They also
2 sought damages for the cost of repairing the alleged defects and
3 the diminution in value of their residences. Id. The Court,
4 however, rejected plaintiffs' argument that defects posing risk
5 of harm to humans constituted cognizable physical injury to
6 property. Id.

7 Following the California Supreme Court's line of reasoning
8 in Aas, the Sixth Appellate District held in County of Santa
9 Clara v. Atlantic Richfield Co. that the presence of lead paint,
10 although posing an "unreasonable danger to human beings," is not
11 a cognizable injury to property for the purposes of accrual of a
12 negligence or strict liability cause of action. 137 Cal. App.
13 4th 292, 324-25 (2006). Instead, plaintiffs must allege that
14 the lead paint threatened the buildings themselves with physical
15 injury. Id. ("[Plaintiffs] have made no allegations that the
16 deteriorated lead paint even threatens *the buildings themselves*
17 with physical injury. They have not alleged that deteriorated
18 lead paint causes the walls or floors of the structure to
19 themselves deteriorate or in any other way causes damage to the
20 physical components of plaintiffs' buildings.").⁴

21 While County of Santa Clara involved lead poisoning, the
22 court noted that its reasoning would also apply to asbestos
23

24 ⁴ The court was careful to cabin this holding -- which applied
25 only to building owners -- from individuals who were actually
26 poisoned by lead. For them, the court held that they "might have
a viable negligence or strict liability cause of action that is not
vulnerable to a statute of limitations defense." County of Santa
Clara, 137 Cal. App. 4th at 324-25.

1 cases. In order to state a negligence or strict liability claim
2 in that context, the court explained, plaintiffs must allege
3 that asbestos fibers damaged other components of the buildings.
4 Id., 137 Cal. App. 4th at 325. The court did not expressly
5 disagree with the outcome in SFUSD, because the plaintiffs in
6 that case had alleged physical damage, and the court found it at
7 least theoretically possible that asbestos fibers might
8 physically damage a building. County of Santa Clara, 137 Cal.
9 App. 4th at 325, n.13. Outside of this remote possibility,
10 however, County of Santa Clara is squarely at odds with the
11 holding in SFUSD.

12 The cases cited by the Peters do not show that
13 contamination -- which, as the court employs the term here,
14 refers to a risk of injury to human health, and/or a condition
15 requiring abatement or clean-up -- is equivalent to property
16 damage. First, the Peters cite to cases arising from insurance
17 disputes in which the term "property damage" was interpreted to
18 encompass environmental contamination. See, e.g., Monstrose
19 Chem. Corp. v. Superior Court, 6 Cal. 4th 287, 303 (1993)
20 (finding that "environmental contamination under CERCLA is
21 'property damage.'"); Aiu Ins. Co. v. Superior Court, 51 Cal. 3d
22 807, 842 (1990). The problem, however, is that these courts
23 were interpreting contracts and therefore not constrained by the
24 economic loss rule that governs tort claims. Second, the other
25 cases cited by the Peters merely rely upon the presence versus
26 contamination distinction set forth in the asbestos cases. See,

1 e.g., Transwestern Pipeline Co. v. Monsanto Co., 46 Cal. App.
2 4th 502, 526-37 (1996).

3 In the case at bar, defendants argue that the Peters'
4 negligence and strict liability claims are barred by the statute
5 of limitations. In light of the recent development in
6 California authority, however, it appears that the opposite is
7 true: far from being stale, plaintiffs' claims have not accrued
8 at all, because they have not alleged, and cannot allege, the
9 existence of a cognizable physical injury to their property.

10 In their complaint, the Peters allege that as a proximate
11 cause of defects in dry cleaning solvents and machinery as well
12 as defendants' negligence, the Peters have suffered "damages
13 including but not limited to diminution in value of the
14 property, lost profits, response costs incurred and to be
15 incurred in the future to properly respond to the alleged PCE
16 contamination in and around the property, and related costs in
17 making the property safe from contamination," TAC ¶ 37, as well
18 as "attorneys' fees and consultants' fees . . . and related
19 costs," TAC ¶ 42.

20 Lost profits and diminution in property value unconnected
21 to physical injury are clearly economic losses, and therefore
22 are not compensable under negligence or strict liability
23 theories. See Aas, 24 Cal. 4th at 639 (finding diminished
24 value of residences containing hazardous defects not
25 compensable).

26 Similarly, the cost of removing hazardous substances and

1 their remediation are economic costs -- not physical injuries to
2 property. See County of Santa Clara, 137 Cal. App. 4th at 292
3 (determining that no cause of action for negligence or strict
4 liability had accrued where plaintiffs claimed the following
5 damages: "costs incurred to inspect and test property and the
6 environment for the presence of lead; [] costs incurred to . . .
7 investigate and respond to lead-contaminated properties . . . ;
8 and [] costs incurred for . . . abatement, removal, replacement,
9 and/or remediation of lead in . . . properties").

10 The Peters have failed to plead the existence of damage to
11 any physical component of their land, and they have not shown
12 that they could allege that PCE physically injured their
13 property. Accordingly, the Peters' claims for negligence,
14 negligence per se, and strict liability have not accrued as a
15 matter of law and are hereby dismissed.

16 **B. Nuisance Per Se**

17 Maytag and Fedders have also raised a statute of
18 limitations defense in response to the nuisance per se claim,
19 which merits separate discussion.

20 The Peters allege that the defendants' actions are a
21 nuisance as defined in California Water Code § 13050(m). That
22 section provides that a nuisance is anything that "[is]
23 injurious to health, or is indecent or offensive to the senses,
24 or an obstruction to the free use of property, so as to
25 interfere with the comfortable enjoyment of life or property."
26 Cal. Water Code § 13050(m)(1). Pollution of water constitutes a

1 public nuisance and becomes a public nuisance per se when the
2 pollution occurred as a result of discharge of waste in
3 violation of California Water Code §§ 13000 et seq. See Cal.
4 Dep't Toxic Substances Control v. Payless Cleaners, 368 F. Supp.
5 2d 1069, 1081 (E.D. Cal. 2005). In addition, where a public
6 nuisance causes an injury to private property, as alleged here,
7 a claim may be brought for private nuisance. Id.

8 Defendants argue that because the nuisance per se claim
9 references Water Code §§ 13000 et seq., it is governed by the
10 three year statute of limitations that applies to claims brought
11 under those sections of the Water Code, namely California Code
12 of Civil Procedure § 338(i).⁵ The Peters contend that because
13 their nuisance claim alleges a continuing nuisance, the statute
14 of limitations does not begin to run so long as the nuisance
15 continues.

16 As an initial matter, defendants' contention that Section
17 338(i) provides the applicable statute of limitations is
18 incorrect. For nuisance per se claims, the applicable statute
19 of limitations is that which would otherwise govern the
20 underlying nuisance or negligence claim, not that which governs
21
22

23 ⁵ California Code of Civil Procedure § 338(i) provides:

24 Within three years:

25 (i) An action commenced under the Porter-Cologne Water
26 Quality Control Act (Division 7 (commencing with Section
13000) of the Water Code).

1 the statute providing the standard of care.⁶ Here, the
2 distinction is somewhat immaterial, because the statute of
3 limitations for ordinary nuisance claims is also three years.
4 Cal. Code Civ. P. § 338(b).

5 The Peters' claim, however, is not an ordinary nuisance
6 claim. Rather, the nuisance per se claim is continuing in
7 character. Where a nuisance is continuing, plaintiffs may file
8 an action for continuing nuisance at any time before the
9 nuisance is abated. Jordan v. City of Santa Barbara, 46 Cal.
10 App. 4th 1245, 1256 (1996) ("[P]ersons harmed by [continuing
11 nuisance] may bring successive actions for damages until the
12 nuisance is abated"); see also Mangini v. Aerojet-General Corp.,
13 12 Cal. 4th 1087, 1097-98 (1996). Once the nuisance is abated,
14 the statute of limitations begins to run. See Chevron U.S.A. v.
15 Superior Court, 44 Cal. App. 4th 1009, 1017 (1994) (finding that
16 where a three year statute of limitations applies, an action for
17 continuing nuisance is timely if it "has been filed before
18 abatement of the nuisance . . . or within three years after
19 abatement").

20 In the case at bar, plaintiffs clearly allege that the
21 contamination is "continuing and abatable." TAC ¶ 50.

22
23 ⁶ See Rivas v. Safety-Kleen Corp., 98 Cal. App. 4th 218, 229
24 (2002)("[I]n ruling upon the applicability of a statute of
25 limitations . . . courts will look to the nature of the rights sued
26 upon rather than to the form of action"); Adobe Lumber, Inc. v.
Hellman, 415 F. Supp. 2d 1070, 1079 (E.D. Cal. 2006) (holding
negligence per se claim based on contamination of real property
barred under the three year statute of limitations provided by Cal.
Code Civ. P. § 338(b) for injury to real property rather than the
statute referenced by the claim).

1 Defendants do not dispute the Peters' characterization of the
2 nuisance as continuing. Neither do defendants allege nor
3 provide evidence that the nuisance has been abated.


4 Accordingly, because plaintiffs' claim has been brought prior to
5 abatement of the nuisance, it is not barred by the statute of
6 limitations.

7 **IV. Conclusion**

8 For the reasons set forth above, Maytag and Fedders' motion
9 for summary judgment is GRANTED with respect to the negligence,
10 negligence per se, and strict liability claims. The motion is
11 DENIED with respect to nuisance per se claim.

12 IT IS SO ORDERED.

13 DATED: August 16, 2007.

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16 LAWRENCE K. KARLTON
17 SENIOR JUDGE
18 UNITED STATES DISTRICT COURT
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